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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON,

Appellants,

—v.—

ELLIOT L. RICHARDSON, Secretary of the United States, Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY and ALBERTUS MAGNUS COLLEGE,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING

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ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING

Appellants respectfully present this petition for rehearing pursuant to Rule 58 of the Rules of this Court and set forth the following grounds in support thereof:

I. Grounds for Petition

In *Lemon* v. *Kurtzman*, No. 89, *Earley* v. *DiCenso*, No. 569 and *Sanders* v. *Johnson*, No. 1596, all but one member of this Court held in effect that a statute such as the one involved in this case would have been unconstitutional on its face had it involved elementary and secondary educational institutions rather than colleges and universities. In the present case, a majority of the Court (Justices Black, Douglas, Marshall, Brennan and White) are of the opinion that there is no constitutional difference between elementary and secondary schools on the one hand and colleges and universities on the other in respect at least to the Establishment Clause.[1] Nevertheless, the disposition of this appeal somehow results in a holding that the challenged statute is not unconstitutional on its face.

It is, however, not this anomalous disposition of this important controversy which is the basis of our petition for rehearing. (It will be the difficult responsibility of the United States Office of Education to pass upon applications for grants from sectarian colleges in the light of the holding or holdings in this case, and the Government might well be advised to join in this petition so that a rehearing could result in a needed clarification which would make its task easier.) Rather, our petition is based on the suggestion that the Court disposed of this case

[1] The suggestion at p. 12 of the plurality opinion that "college students are less impressionable and less susceptible to religious indoctrination" than elementary or secondary school students might well have relevancy to a challenge under the Free Exercise Clause but does not seem to have any where the contested issue is the applicability of the Establishment Clause.

in the capacity of a trial rather than appellate tribunal and did so on concessions not made, allegations not unchallenged and facts not found.

The Government took the position in the District Court that neither statutorily nor constitutionally was it relevant what a grantee college is (unless it is a divinity school), what it does, why it does it and how it does it, so long as the particular facility financed with Federal funds is not used for sectarian instruction or religious worship. The plaintiffs conceded that in none of the four colleges joined as defendants were the facilities financed with Federal funds used for sectarian instruction or religious worship—indeed, lacking the financial and investigative resources of the United States Office of Education and Department of Justice, a handful of citizen-taxpayers could hardly do otherwise. The District Court accepted in full the Government's position and on the basis thereof and on the plaintiffs' concession ruled in favor of both the Government and the defendant colleges without finding it necessary to pass upon the many contested factual issues.

It is not quite clear from the Government's brief to this Court whether it has abandoned the position taken by it in the District Court. But whether it has or has not, that position has not won the acceptance of any member of this Court; even Mr. Justice White, the only dissenter in *Lemon-Kurtzman*, agrees that if "any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith • • • the legislation would to that extent be unconstitutional." (Slip Opinion p. 11, footnote 2.)

But by rejecting both the Government's position and its acceptance by the District Court, this Court found itself without any findings of fact upon which it could dispose of the controversy in respect to the four defendant colleges except by acting as a trial court itself and making for itself the necessary factual findings. The plurality opinion justifies this on the ground that although "the District Court made no findings with respect to the religious character of the four institutions of higher learning, we are not required to accept the allegations as true under these circumstances, particularly where, as here, appellants themselves do not contend that these four institutions are 'sectarian.'"

We are frankly at a loss to understand this statement. Throughout these proceedings, including oral argument before this Court, we sought, apparently unsuccessfully, to make clear that we conceded nothing except that the Federally-financed facilities were not used for religious purposes. From the very beginning of this litigation and up to the present time we do in fact contend that the defendant institutions are "sectarian." In our main brief, for example, we noted (p. 35, footnote) that at least one of them, Albertus Magnus, was founded by Pattillo and Mackenzie, in their careful study Church-Sponsored Higher Education in the United States, to possess all six elements characteristic of sectarian colleges. We stated in our Reply Brief to this Court (at p. 5) that

> • • • to make our position clear, we state that while we not contend that any of the defendant colleges now fit the composite description we have set forth, neither do we concede that none of them substantially fitted the description when the grants to them

were approved by the Government. On the contrary, we believe that the District Court could well have found on the evidence before it that one or more of the defendant colleges did fit the description at that time.

We noted in our Reply Brief that most of the evidence presented by the four colleges to challenge our claim of sectarianism related to changes that took place *after* the grants to them were approved by the Government and even after this suit was commenced and in fact some that had not yet been made but were only planned or contemplated at the time of the trial.[2]

We pointed out often throughout this litigation, that our major thrust was at the action of the Government in approving grants to sectarian institutions, and alleged throughout that, unless enjoined, it would continue to approve grants to institutions such as the four college defendants were at the time the grants to them were approved. For that reason, we submit, the situation which existed at those times and not at the time of trial presented the critical constitutional issue in this litigation. But even if that is not so, even if constitutionality of the grants to the four colleges must be determined as of the time of trial, we submit nevertheless that there was enough evidence presented upon which a trial court could have found that each of them was sectarian within the purview of the plurality opinion and thus constitutionally barred from receiving the

[2] For example, the plurality opinion notes (on p. 13) that "some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis." But this was a quite recent development and was not the case when the grants to them were approved by the Government.

challenged grants. To support this assertion we set forth the following instances.

1. As we noted above, Mr. Justice White is of the opinion—as it may be assumed are all the other members of the Court—that a grant cannot constitutionally be made to an institution which restricts entry on religious grounds. Yet, appellee Annhurst College admits *inter alia* that even at the time of the trial 95 percent of its student body were Catholic, its Application for Admission asked for the religion not only of the applicant but also of her parents, its publications described it as a "Catholic liberal arts college for women" and stated that it is "conducted by the Daughters of the Holy Ghost," it suspended classes on Catholic holy days, had a Catholic chaplain and provided regular Catholic religious services on campus, but had no non-Catholic chaplain and provided no non-Catholic religious services on campus. (Brief of Appellee Colleges, pp. 18a-22a.) Could not a trial court have reasonably found on the basis of these concessions alone that Annhurst College does in fact restrict entry on religious grounds?

2. Mr. Justice White also agrees—and again it may be assumed that so do all the other Justices—that an institution would be constitutionally ineligible to receive grants if it "required all students gaining admission to receive instruction in the tenets of a particular faith." The appellee colleges concede that "Catholic students at the defendant [Fairfield] University are required to take two specified courses and two elective courses in the Theology Department." (Appellee Colleges' Brief, p. 4a.) At Albertus Magnus all Catholic students are required to take specified courses in Biblical Theology and Systematic Catholic The-

ology and to participate in an annual Retreat. Even if the small percentage of non-Catholics at these institutions, if there be any, are exempt from taking the required theology courses, we doubt that this would remove the taint of unconstitutionality from the grant.[3]

3. The plurality opinion acknowledges (at p. 8) that "appellants introduced several institutional documents which stated certain religious restrictions on what could be taught • • • ."[4] The opinion, however, adds that "other evidence showed that these restrictions were not in fact enforced • • • ." Assuming that neglect of enforcement may remove the taint of unconstitutionality from the grant, it remains true that the trial court did not find as a fact that the restrictions were not enforced or that the institutions' subscription to the 1940 Statement of Principles on Academic Freedom and Tenure was not treated as cavalierly as it is asserted the institutions' own documents were

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[3] The great Virginia Statute Establishing Religious Freedom provides in part:

"• • • even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind." (Quoted in *Everson* v. *Board of Education*, 380 U.S. 1, 44 (1947).)

[4] One of the documents states that a faculty member "is not free to disseminate doctrines and views that are subversive . . . of the aims and purposes of the College as a Catholic institution committed to the inculcation of Christian faith and morality." Appellee Colleges' Brief, p. 16a.

treated.[5] Moreover, most trial courts would probably give greater weight to documentary admissions against interest, particularly where the *ante litem motam* documents are still extant and have not been in any way officially rescinded or even modified, than to oral testimony that they are in fact not enforced. In any event, the proper forum for the resolution of a conflict between documentary and oral testimony is the trial court, at least in the first instance.

4. The plurality opinion states (at p. 3) that "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities." No such finding of fact was made by the District Court as to any of the institutions. As we have just noted one of the institutions speaks of "the aims and purposes of the College as a Catholic institution committed to the inculcation of Christian faith and morality." The trial record is replete with similar statements in the catalogues and other documents of the institutions. We find it difficult to understand how this Court can make such a factual determination when the plaintiffs have consistently alleged and introduced evidence to the contrary and the trial court made no finding of fact respecting this strongly contested issue.

5. The plurality opinion states (at p. 13) that "[n]ot one of these four institutions requires its students to attend religious services." But the plaintiffs introduced evidence

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[5] Plaintiffs introduced into evidence at the trial depositions showing that while Fairfield University subscribed to the 1940 Statement, faculty could not undermine the basis of its Catholic commitment. No professor is expected to promote doctrine in clear and direct violation of Catholic teaching, and each recognizes by contract his liability to termination for any grave offense against Catholic doctrine or morality. Appellants' Reply Brief, p. 7a.

that in at least some of the institutions the Catholic students were required to attend religious retreats and the trial court made no factual finding to the contrary.

These instances and others in the plurality opinion and in the concurring opinion of Mr. Justice White show clearly that a majority of the Court have usurped the function of a trial court, reaching the following rather startling result. All of the Justices of the Court (the four Justices concurring in the plurality opinion, Mr. Justice White, and certainly the four dissenters) agree that:

(1) an institution which restricts admission on the basis of religion cannot constitutionally receive grants of tax-raised funds for the construction of facilities even if neither sectarian instruction nor religious worship takes place therein;

(2) the same is true in respect to an institution which requires its students to receive instruction in the tenets of a particular faith.

In addition, at least eight of the nine Justices agree that:

(3) an institution is constitutionally ineligible to receive a grant if it imposes religious restrictions on what can be taught; or

(4) has religious indoctrination as a substantial purpose or activity; or

(5) requires its students to attend religious services.

Appellants alleged and introduced evidence showing that all these factors were present in each of the four colleges joined as defendants in the suit. The trial court made no finding to the contrary. Nevertheless, a majority of this Court holds that each of the four colleges was constitution-

ally eligible to receive the grants made to it by the Government. The result, we suggest, is as anomalous as that presented in the first substantive paragraph of this petition.

II. Conclusion

For the reasons set forth herein, the appellants petition this Court for rehearing so that the remand of the case to the District Court shall direct it to formulate findings of fact on the controverted factual questions raised by the pleadings and evidence in the case.

Respectfully submitted,

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Certification Pursuant to Rule 58(1)

Leo Pfeffer certifies that he is a member of the bar of this Court and one of the attorneys in the within appeal, and that this petition is presented in good faith and not for delay.

LEO PFEFFER